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IN THE

Supreme Court of the United States.

No. October Term, 1936.

GENERAL BAKING COMPANY,

Petitioner,

vs.

LUTHER A. HARR (SUCCESSOR TO WILLIAM D. GORDON), SECRETARY OF BANKING FOR THE COMMONWEALTH OF PENNSYLVANIA, IN POSSESSION OF THE BUSINESS AND PROPERTY OF THE FRANKLIN TRUST COMPANY, AND CHARLES I. ENGARD (SUCCESSOR TO JOHN J. SULLIVAN), SPECIAL DEPUTY IN CHARGE,

Respondents.

Petition for Writ of Certiorari.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petition of the General Baking Company respectfully represents:

This is a petition for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit to review the decree of that court entered on September 28, 1934 (R. p. 160), and the decree entered, after rehearing on September 11, 1936 (R. p. 190), as corrected by the decree entered on October 16, 1936 (R. p. 192). Part I of the petition deals with the jurisdictional questions involved. Part II deals with the questions involved on the merits of the case.

PART I.

A. Questions Involved.

1. Is it error for a District Court of the United States to exercise its jurisdiction over a controversy between a claimant of certain funds in excess of $3,000.00, who is a citizen of one state, and the Secretary of Banking of another state in possession (under authority of a local statute) of a bank, who denies the claim, if all of the funds are held in escrow by a third party by stipulation of the parties entered into pursuant to an order of the District Court and part of them have never passed through the hands of either the bank or the Secretary of Banking, but were deposited directly in escrow?

2. Is it error for the Circuit Court of Appeals, after having decided the above controversy on its merits by affirming the decree of the District Court, to enter, approximately five years after the institution of suit and almost a year and three-quarters after rehearing on the merits, a second decree affirming the decree of the District Court solely on the ground that the District Court erred in exercising jurisdiction and directing the District Court to refer the cause to the state court, in which claimant's remedy may be barred by lapse of time?

B. Federal Statute Involved.

The question of the jurisdiction of the Federal Court involves Section 24 of the Judicial Code, Act of March 3, 1911, c. 231; 36 Stat. 1091; 28 U. S. C. A. § 41 (1).

C. State Statute Involved.

The question of the jurisdiction of the Federal Court also involves the Act of Assembly of the Commonwealth of Pennsylvania of June 15, 1923, P. L. 809, §§ 21, 22, 29, 30, 35, as amended by the Act of May 5, 1927, P. L. 762, §§ 7, 11, 12 (now repealed and supplanted by the Act of May 15, 1933, P. L. 565), §§ 701, 713 (b) and (c)).

D. Statement of the Case.

Your petitioner is General Baking Company, a citizen of the State of New York. Respondents are the Secretary of Banking of the Commonwealth of Pennsylvania and his deputy, both citizens of that Commonwealth. (The present respondents, Luther A. Harr and Charles I. Engard, are the successors in office to the original respondents, William D. Gordon and John J. Sullivan.) On October 5, 1931, respondents, under authority and by virtue of a State statute, took possession and control of the property and assets of Franklin Trust Company, a banking corporation located in Philadelphia, Pennsylvania, and a citizen of the Commonwealth of Pennsylvania, and the Secretary of Banking forthwith filed a copy of his certificate of taking possession of said bank with the Prothonotary of the Courts of Common Pleas of Philadelphia County.

On November 12, 1931, petitioner filed in the District Court of the United States for the Eastern District of Pennsylvania a bill in equity against respondents praying (1) that the court declare petitioner to be the owner of certain sums of money totalling $32,403.26, and (2) that a trust be impressed on certain other sums of money totalling $49,590.17. The $32,403.26 consisted of funds in the possession and control of certain banks in New Jersey, Delaware

and Eastern Pennsylvania of which, at the time Franklin Trust Company was taken over by respondents, $6,989.08 was represented by uncollected checks and drafts and $25,414.18 was cash (R. pp. 49, 50). The $49,590.17 consisted of funds in the hands of Franklin Trust Company of which, at the time Franklin Trust Company was taken over by respondents, $8,947.66 was represented by uncollected drafts and checks and $40,642.67 was cash (R. p. 51).

The bill also prayed for an injunction restraining the respondents from collecting the $32,403.26, which respondents claim Franklin Trust Company owns. On November 12, 1931, the District Court, after hearing, filed the following opinion (which is not a part of the record):

> "Upon the condition that defendant stipulates that a separate account will be kept of all moneys collected or received, which are subject to the claim of the plaintiff in the Bill, to the end that whatever claim or title or otherwise which the plaintiff has to said moneys may be asserted to and against the sum in the hands of the defendant, the motion for preliminary injunction is denied."

The entire $81,993.43 is now held in escrow by a third party in accordance with this ruling.

The District Court held that it had and would exercise jurisdiction of the controversy, and on June 14, 1933, entered a decree (R. p. 114) dismissing the bill (which had then been twice amended, the second time after reargument) on its merits. Petitioner thereupon appealed to the United States Circuit Court of Appeals for the Third Circuit. No cross-appeal on the jurisdictional question was taken by respondents.

The Circuit Court of Appeals likewise exercised jurisdiction over the controversy and on September 28, 1934,

entered a decree (R. p. 160) affirming the decree of the District Court. On November 21, 1934, the Circuit Court of Appeals granted (R. p. 185) petitioner's petition for a rehearing on the merits (R. pp. 163 to 183, incl.). Reargument on the merits was heard on December 15, 1934. On September 11, 1936, almost a year and three-quarters later, the Circuit Court of Appeals entered a decree (R. p. 190) *reversing* the decree of the District Court and remanding the cause with directions to dismiss the bill on the ground that the District Court was in error in exercising jurisdiction. On October 16, 1936, the Circuit Court of Appeals entered a decree (R. p. 192) correcting its decree of September 11, 1936, and *affirming* the decree of the District Court with directions to refer the cause to the State Court.

E. Reasons for Granting the Petition.

1. The decision of the United States Circuit Court of Appeals for the Third Circuit (R. pp. 186 to 190, incl.), pursuant to which it entered its decree of September 11, 1936 (R. p. 190), and its decree of October 16, 1936 (R. p. 192) is in direct conflict with the decisions of this Court in the cases of *Chicot County v. Sherwood,* 148 U. S. 529, 37 L. ed. 546, 13 S. Ct. 695 (1893); *Commonwealth Trust Company of Pittsburgh et al. v. Avery J. Bradford, Receiver of the Bank of Pittsburgh National Association, etc.,* 297 U. S. 613, 80 L. ed. 590, 56 S. Ct. 600 (1936); *Riehle, Receiver v. Margolies,* 279 U. S. 218, 73 L. ed. 669, 49 S. Ct. 310 (1929); and *McClellan v. Carland, United States District Judge for the District of South Dakota,* 217 U. S. 268, 54 L. ed. 762, 30 S. Ct. 501 (1910).

2. It is of vast public importance for this Court to decide whether a Federal Court is justified in refusing to

take jurisdiction (where otherwise appropriate) over an action *in personam* against a State liquidator to establish a right to participate in the eventual distribution of the assets of the corporation being liquidated, which is one of a class affected with a public interest, on the ground that the State statute created and established a system for the liquidation of such corporations, when insolvent, and the liquidator is in possession and control of the assets of the corporation in question under the authority of said statute.

3. The decision of the United States Circuit Court of Appeals for the Third Circuit is in direct conflict with the decision of the United States Circuit Court of Appeals for the Fifth Circuit in the case of *Amos, Comptroller of State of Florida v. Trust Co. of Florida et al.*, 54 F. (2d) 286 (1931).

4. The question, whether Federal Courts may exercise jurisdiction in the first instance and determine controversies and then, when the plaintiff may be barred by reason of the lapse of time from presenting its claim in the State Courts, decline to exercise jurisdiction, is an important one and has never been decided by this Court.

5. The proper determination of the questions here presented is of paramount public importance. It is imperative at this time that this Court finally settle and delimit the boundaries of the jurisdiction of the Federal courts and the State courts in controversies involving the claims *in personam* brought by a citizen of a foreign state against state banking corporations which are being liquidated by State officers pursuant to State statutes.

PART II.

A. Questions Involved.

1. Is a Federal Court, in a controversy arising between the state liquidator of a bank and a citizen of a foreign state, bound to apply a state statute which, as interpreted by the highest court of the state, provides that, as between a customer and a bank, title to checks and drafts deposited by the customer with the bank for collection does not pass to the bank when insolvency intervenes before the bank actually receives the proceeds thereof?

2. May liquidators of an insolvent bank recover from a subagent of the bank and mingle with the bank's general funds for the benefit of its general creditors, to the exclusion of the claimant, money delivered to the subagent by the claimant for credit to the bank under an agreement with the bank to deliver to the claimant in another city an equivalent sum in cash, where the subagent had not parted with the money and the bank had not received a credit advice from the subagent until after it had been declared insolvent and taken over by the liquidators?

3. Does a trust arise where a bank, for a consideration, from time to time accepts cash from its customer's agent in one city under an agreement to forward and deliver the cash, in cash, to the customer in another city on stated days?

4. Is there an equitable assignment to a customer of cash accepted by a bank from the customer's agent in one city under an agreement to forward and deliver the cash to the customer in another city, on a stated day, if the bank fails to carry out its agreement?

5. May a district court of the United States decide a controversy on a bill in equity and answer thereto, without affirming or denying plaintiff's requests for findings of facts and conclusions of law?

B. State Statute Involved.

The merits of the case involve the Act of Assembly of the Commonwealth of Pennsylvania of June 12, 1931, P. L. 568, the short title of which is the "Bank Collection Act of 1931."

C. Statement of the Case.

This case was decided on the merits by the District Court (R. pp. 30 to 37 incl. and 109 to 113 incl.) and by the Circuit Court of Appeals in its first opinion (R. pp. 158 to 160, incl.), on bill and answer.

It appears from the pleadings that on August 25, 1925, an agreement was entered into by petitioner and Franklin Trust Company, the terms of which after an oral modification made in August, 1930, were as follows:

(a) Petitioner would open a checking account with the Franklin Trust Company and maintain an average balance of not less than $25,000.00 on which no interest would be paid; said account to be known as a "Disbursement Account".

(b) On Wednesday of each week, petitioner would forward from its New York office to the Franklin Trust Company, a sum sufficient to maintain an average balance of not less than $25,000.00 in said checking account;

(c) The Franklin Trust Company would accept from petitioner's distributors in Philadelphia, cash,

also drafts and checks for collection, for the purpose of forwarding the cash, together with the proceeds of the drafts and checks, on Monday and Wednesday of each week to petitioner, or its depository in New York City; said account to be known as a "Deposit Account".

(d) The Franklin Trust Company would select, subject to the approval of petitioner, certain correspondent banks in neighboring towns and cities in New Jersey, Delaware and Eastern Pennsylvania, to accept, from distributors of petitioner, cash, drafts and checks to be credited to, and subject to the check of the Franklin Trust Company only, but earmarked as the funds of petitioner; a written acknowledgment of receipt of said cash, drafts and checks by each of said correspondent banks to be mailed immediately upon receipt of same to plaintiff in New York City, and a credit advice to be immediately sent to the Franklin Trust Company whereby all cash, drafts and checks accepted by said correspondent banks were to be credited to the said deposit account referred to in Clause (c) above, for the purpose of the Franklin Trust Company forwarding the cash and the proceeds of the drafts and checks, together with the amount referred to in Clause (c) above, on Monday and Wednesday of each week, to petitioner, or its depository in New York City.

(e) Petitioner might, at the special request and for the sole benefit of the Franklin Trust Company, from time to time, enter into separate and distinct oral agreements with the Franklin Trust Company whereby petitioner would allow the Franklin Trust Company to use certain sums from those accepted by it for the purpose as set forth in Clauses (c) and (d)

above, for certain periods of time, these sums to be called by petitioner's check only, instead of being forwarded by the Franklin Trust Company. Under such agreements, and no other, could said funds, ever, become subject to check. (R. pp. 43, 44, 47, 48, 49.)

Petitioner, up until October 5, 1931, and Franklin Trust Company, up until September 30, 1931, both performed their obligations under the agreement (R. pp. 46, 49). On different occasions during the period from August, 1925, to October 5, 1931, petitioner, in accordance with the terms of the agreement set forth in paragraph (e) above, allowed Franklin Trust Company to use sums totalling $1,090,000.00 in its general banking business. (R. pp. 47, 49.)

On Monday, October 5, 1931, Franklin Trust Company was open for business during the entire day (R. p. 38). It then had in its possession the cash sum of $40,642.67, which it, in violation of its agreement with petitioner, failed to forward on that day to the petitioner's depository in New York City (R. p. 51). It also, in accordance with said agreement, had in its hands uncollected drafts and checks in the amount of $8,947.66 (R. pp. 50, 51). The $40,642.67, and the proceeds of the drafts and checks, were, without petitioner's consent or approval, diverted to and mingled with Franklin Trust Company's cash funds (R. pp. 51, 80). The cash funds of the Franklin Trust Company, which were augmented thereby to the extent of $49,590.17 (R. pp. 51, 81), have at all times, since Franklin Trust Company received the $40,642.67 in cash and the proceeds of the drafts and checks, been in excess of $49,590.17 (R. pp. 51, 81). There are now in respondents' possession and control assets of Franklin Trust Company sufficient to pay petitioner and all other preferred creditors (R. pp. 52, 81).

When, at the close of the business day on October 5, 1931, the Franklin Trust Company was taken over by the respondents, there was the sum of $32,403.26 in cash and uncollected drafts and checks in the possession of outlying banks in New Jersey, Delaware and Eastern Pennsylvania. This sum had been received by the said banks on October 2, 3, and 5, 1931, pursuant to the terms of the agreement between petitioner and Franklin Trust Company (R. pp. 49, 50). Receipt of the cash was noted on the books of said banks on October 5, 1931, but the drafts and checks were not collected until thereafter (R. p. 50). Credit advices from these banks pertaining thereto were not received by Franklin Trust Company but by the respondents after Franklin Trust Company had been declared insolvent and it had been taken over by respondents (R. p. 50).

The District Court held that petitioner was not the owner of the $32,403.26, and there was no ground for impressing the $49,590.17 with a trust in petitioner's favor and dismissed the bill (R. pp. 30 to 37, incl., and 109 to 114, incl.). After reargument but prior to the District Court's final decision of the case petitioner filed requests for findings of fact and conclusions of law (R. pp. 84 to 108, incl.). These were never answered and the District Court did not make findings and conclusions of its own. The Circuit Court of Appeals, in an opinion filed on September 28, 1934 (R. pp. 158 to 160, incl.), followed the decision of the District Court and affirmed its action in dismissing the bill.

On November 21, 1934, the Circuit Court of Appeals granted (R. p. 185) petitioner's petition for a rehearing on the merits (R. pp. 163 to 183, incl.). Reargument on the merits was heard on December 15, 1934. On September 11, 1936, almost a year and three-quarters later, the Circuit

Court of Appeals entered a decree (R. p. 190) *reversing* the decree of the District Court and remanding the cause with directions to dismiss the bill on the ground that the District Court was in error in exercising jurisdiction. On October 16, 1936, the Circuit Court of Appeals entered a decree (R. p. 192) correcting its decree of September 11, 1936, and *affirming* the decree of the District with directions to refer the cause to the State Court.

D. Reasons for Granting the Petition.

1. The decision of the United States Circuit Court of Appeals for the Third Circuit (R. pp. 158 to 160, incl.) affirming the decisions of the District Court of the United States for the Eastern District of Pennsylvania (R. pp. 30 to 37, incl., and 109 to 114, incl.), pursuant to which it entered its decree of September 28, 1934 (R. p. 160), is in direct conflict with the decision of the Supreme Court of the Commonwealth of Pennsylvania in the case of *Franklin Trust Company* (*claim of C. D. Tuska*), 319 Pa. 302 (1935), construing the Pennsylvania Bank Collection Act of June 12, 1931, P. L. 568.

2. Said decision of the United States Circuit Court of Appeals for the Third Circuit is in direct conflict with the decision of this Court in the case of *Commercial Bank of Pennsylvania v. Armstrong,* 148 U. S. 50, 37 L. ed. 363, 15 S. Ct. 533 (1893).

3. Said decision of the United States Circuit Court of Appeals for the Third Circuit is in direct conflict with the decision of the Court in the case of *Libby v. Hopkins,* 104 U. S. 303, 26 L. ed. 769 (1881).

E. Prayer for Writ of Certiorari.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari may be issued out of and under the seal of this Court, directed to the United States Circuit Court of Appeals for the Third Circuit commanding said Court to certify and send to this Court on a day certain, to be thereafter designated, a full and complete transcript of the record of the proceedings in said Court entitled "*General Baking Company v. Luther A. Harr* (Successor to William D. Gordon), Secretary of Banking for the Commonwealth of Pennsylvania, in possession of the business and property of the Franklin Trust Company, and *Charles I. Engard* (Successor to John J. Sullivan), Special Deputy in Charge, number 5303, October Term, 1933," to the end that the said case may be reviewed and determined by this Court; that petitioner may have such relief as this Court may deem proper, and that the opinions and decrees of the said Circuit Court of Appeals for the Third Circuit and of the District Court for the Eastern District of Pennsylvania may be reversed by this Honorable Court.

GENERAL BAKING COMPANY,
By

GEORGE E. BEECHWOOD,
J. HARRY LABRUM,
WILLIAM J. CONLEN,
Attorneys for Petitioner.

CERTIFICATION.

I hereby certify that I am a member of the Bar of the Supreme Court of the United States; that I am counsel for General Baking Company, the petitioner; that the foregoing petition has been prepared in accordance with the request of the petitioner; that the allegations in said petition are true to the best of my knowledge, information and belief; that said petition is not made for the purpose of delay or prolongation of litigation, and is in my opinion well-founded in law and in fact, and should be granted.

GEORGE E. BEECHWOOD.

Brief in Support of Petition for Writ of Certiorari.

I. OPINIONS OF THE COURTS BELOW.

The first opinion of the District Court (per Judge Dickinson) was filed November 12, 1931. It was not reported and is not a part of the record, but appears in full *ante* page 4. The second opinion of the District Court (per Judge Kirkpatrick) was filed October 11, 1932 (R. pp. 30 to 37) and is reported in 9 Fed. Supp. 210. The third opinion (per Judge Kirkpatrick) was filed June 8, 1933 (R. pp. 109 to 113) and is reported in 9 Fed. Supp. 210.

The first opinion of the Circuit Court of Appeals (per Circuit Judge Davis) was filed September 28, 1934 (R. pp. 158 to 160). The second opinion (per Circuit Judge Davis) was filed September 11, 1936 (R. pp. 186 to 190). The third opinion (per Circuit Judge Davis) was filed October 16, 1936 (R. p. 191). None of the decisions of the Circuit Court are reported.

II. JURISDICTION OF THE COURT.

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, Act of March 3, 1911, c. 231, 36 Stat. 1157, as amended by the Act of February 13, 1925, c. 229, 43 Stat. 938; 28 U. S. C. A. § 347.

The jurisdiction of the Federal courts is invoked under Section 24 of the Judicial Code, Act of March 3, 1911, c. 231, 36 Stat. 1091; 28 U. S. C. A. § 41 (1).

The final decree of the Circuit Court of Appeals was entered October 16, 1936. The petition for certiorari was filed December 8, 1936.

III. FACTS.

The facts are stated in the petition *ante,* pages 3 to 5, 8 to 12.

We emphasize the fact that the funds in the outlying banks in New Jersey, Delaware, and Eastern Pennsylvania were never in respondents' possession or control, and that respondents stipulated and agreed to place the funds in escrow pending a determination of the ownership thereof by the Federal Court (R. pp. 50, 90).

Respondents' counsel has personally informed petitioner's counsel that in the event claim is now or hereafter made in the State court for a preference respecting any or all of the sums in controversy, respondents will contest the same on the ground that the claim is brought too late in that Court, and your petitioner is barred therefrom. Petitioner does not admit the correctness of this position, yet, it must be considered in determining whether or not the Federal Court should exercise its jurisdiction.

IV. SPECIFICATIONS OF ERROR.

A. The Circuit Court of Appeals for the Third Circuit erred in deciding that the District Court erred in exercising jurisdiction of the instant controversy.

B. The Circuit Court of Appeals for the Third Circuit erred in refusing to follow the decision of the Supreme Court of Pennsylvania in the case of *Franklin Trust Company (Claim of C. D. Tuska)*, 319 Pa. 302 (1935), interpreting and applying the Pennsylvania Banking Act of June 12, 1931, P. L. 568.

C. The Circuit Court of Appeals for the Third Circuit erred in entering its decrees of September 28, 1934 (R. p.

160), September 11, 1936 (R. p. 190), and October 16, 1936 (R. p. 192).

D. The Circuit Court of Appeals for the Third Circuit erred in failing to sustain assignments of error numbers 72, 74, 75, 77, 78, 79, 80, 81, 84, 85, 87 and 90 (R. pp. 145 to 152) filed by petitioner in that court.

V. ARGUMENT.

A. The Federal Court should exercise jurisdiction over this controversy.

The Circuit Court of Appeals in justification of its decision that the Federal Court should not exercise jurisdiction of the present controversy cited the decisions of this Court in *Gordon v. Washington,* 295 U. S. 30, 79 L. ed. 1282, 55 S. Ct. 584 (1936); *Pennsylvania v. Williams,* 294 U. S. 176, 79 L. ed. 841, 55 S. Ct. 380 (1935); *Gordon v. Ominsky,* 294 U. S. 186, 79 L. ed. 848, 55 S. Ct. 391 (1935); *Penn General Casualty Company v. Pennsylvania,* 294 U. S. 189, 79 L. ed. 850, 55 S. Ct. 386 (1935).

All of these cases involved the exercise of jurisdiction by the Federal District Court for the purpose of appointing receivers to take possession and control of the property and assets of insolvent Pennsylvania financial corporations, with power to liquidate and distribute said property and assets to creditors, thereby divesting the state statutory liquidators from the possession and control of said property and assets.

No such question arises in the instant case. This is a suit *in personam,* to establish the ownership to certain funds, and a preference in other funds. Therefore, the cited cases do not apply.

Attention is called to the fact that the property and assets of the Franklin Trust Company are vested in the respondent as Secretary of Banking for the Commonwealth of Pennsylvania pursuant to statute, and this independent of action, consent or approval of the State court. See Act of June 15, 1923, P. L. 809, §§ 21, 22, 29, 30, 35, as amended by the Act of May 5, 1927, P. L. 762, §§ 7, 11, 12 (now repealed and supplanted by the Act of May 15, 1933, P. L.

565, §§ 504, 701, 713 (b) and (c)). Respondent was appointed by the Governor of the Commonwealth of Pennsylvania, with the consent and approval of the Senate. See Act of Apr. 9, 1929, P. L. 177, Art. II, § 207, as amended by Act of May 21, 1935, P. L. 217, § 1. Moreover, no order or decree of the State court or any other Court has been entered enjoining or restraining petitioner from prosecuting any suit against respondent.

This Court in *Pennsylvania v. Williams, supra* (294 U. S. 176, 184) speaking on this subject, stated:

> "Here no state court is asserting jurisdiction, but the state officer, charged by the statutes of the state with the duty of supervising its own building and loan associations and of liquidating them by an adequate procedure when insolvent, asks to proceed with the liquidation. See Amos v. Trust Company of Florida, C. C. A. 5th, 54 F. (2d) 286, 288."

The case of *Amos, Comptroller of State of Florida v. Trust Company of Florida,* 54 F. (2d) 286 (C. C. A. 5th, 1931), cited with approval above, clearly holds that a Liquidator of banks (similar to the Pennsylvania Secretary of Banking) for the State of Florida is subject to suit in the Federal Court, and that even though the Liquidator was confirmed by the State Court he is not a representative of the Court but of the State. The Court said at page 288:

> "Like the receiver of a national bank, the liquidator, though confirmed by a court, is not an officer of the court, but the representative of the comptroller. . . . He is in court only as he may be specially impleaded. No question of comity between courts arises."

The Pennsylvania Act of Assembly of May 15, 1933, P. L. 565, § 713 (c) (supplanting the Act of June 15, 1923, P. L. 809, § 35) provides:

> "Any action at law or in equity, based upon a cause of action against the institution of which the secretary is receiver, which may be brought against the secretary as receiver, shall be instituted *only in the court in which the certificate of possession is filed.*" (Italics ours.)

This Court has repeatedly ruled that the Circuit Court of Appeals in the instant case should not have abdicated its jurisdiction in favor of the State court, even though this course was prescribed by the Pennsylvania statutes.

> *Chicot County v. Sherwood,* 148 U. S. 529, 37 L. ed. 546, 13 S. Ct. 695 (1893);
>
> *McClellan v. Carland, United States District Judge for the District of South Dakota,* 217 U. S. 268, 54 L. ed. 762, 30 S. Ct. 501 (1910);
>
> *Commonwealth Trust Company of Pittsburg et al. v. Avery J. Bradford, Receiver of the Bank of Pittsburgh National Association, etc.,* 297 U. S. 613, 80 L. ed. 590, 56 S. Ct. 600 (1936).

In *Chicot County v. Sherwood, supra,* it was held that a Statute of the state of Arkansas requiring all claims made against a County in Arkansas on certain bonds issued by it to be presented in the County court, did not avail to preclude the Federal lower court from exercising jurisdiction of a suit against the said County brought by a citizen of a foreign state. The court stated at page 533:

> ". . . the suit is so maintainable in the state courts as to be cognizable by original process in a federal court, where the parties have the proper citizenship to confer jurisdiction. Any other view of the subject would prevent citizens of other States from resorting to the federal courts for the enforcement of their claims

against counties of the State, and limit them to the special mode of relief prescribed by the act of February 27, 1879. The jurisdiction of the federal courts is not to be defeated by such state legislation as this. In Hyde v. Stone, 20 How. 170, 175, it is said: 'But this court has repeatedly decided that the jurisdiction of the courts of the United States over controversies between citizens of different States cannot be impaired by the laws of the States, which prescribe the modes of redress in their courts, or which regulate the distribution of their judicial power. . . . They cannot abdicate their authority or duty in any case in favor of another jurisdiction. Suydam v. Broadnax, 14 Pet. 67; Union Bank v. Jolly's Administrators, 18 How. 503.' This principle has been steadily adhered to by this court."

In *McClellan v. Carland, supra* (217 U. S. 268), the Circuit Court stayed proceedings before it between citizens of different states involving the jurisdictional amount, pending a determination thereof by the State court. The Circuit Court of Appeals refused to issue a mandamus to the Judge of the lower court. This Court, on writ of certiorari, held that the Circuit Court had no right to stay the proceedings, stating at page 281:

"The case made upon the bill was within the original jurisdiction of the Circuit Court of the United States. The right of the Circuit Court to maintain such actions, notwithstanding the legislation of the State creating probate courts, has been so recently before this court as to require no further consideration now. Waterman v. Canal-Louisiana Bank, 215 U. S. 33. In that case, following previous decisions of this court, it was held that the chancery jurisdiction of the Federal courts to entertain suits between citizens of different States to determine interests in estates, and to have

the same fixed and declared, having existed from the beginning of the Federal government, and created by the grant of equity jurisdiction to such courts as it existed in the chancery courts of England, could not be impaired by subsequent state legislation creating courts of probate. The action was therefore within the jurisdiction of the Circuit Court of the United States.

". . . It, therefore, appeared upon the record presented to the Circuit Court of Appeals that the Circuit Court had practically abandoned its jurisdiction over a case of which it had cognizance, and turned the matter over for adjudication to the state court. This, it has been steadily held, a Federal court may not do. Chicot County v. Sherwood, 148 U. S. 529, 534."

In *Commonwealth Trust Company of Pittsburgh et al. v. Bradford, supra* (297 U. S. 613), where a Trustee of a fund was appointed by a State Probate Court and was sued in the federal District Court to establish a claim against said fund by a Receiver of a National bank, this Court stated at page 616:

"The jurisdiction of Federal Courts to entertain suits against the latter is clear, when instituted in order to determine the validity of claims against the estate or claimants' interests therein. Such proceedings are not in rem; they seek only to establish rights; judgments therein do not deal with the property and order distribution; they adjudicate questions which precede distribution. . . . Property in its (trustee) possession is not in custodia legis as in case of receivers . . ."

"The trial court properly exercised the jurisdiction which it acquired. The doctrine approved in Pennsylvania v. Williams, 294 U. S. 176, 79 L. ed. 841, 55 S. Ct. 380, 96 A. L. R. 1166, and Penn General Casualty Co. v. Pennsylvania, 294 U. S. 189, 79 L. ed. 850,

55 S. Ct. 386, supra, is not applicable. In each of those cases we found conflict between the Federal Court and authorities of the State concerning liquidation of the business and assets of an insolvent local corporation. The question was whether, under the peculiar circumstances disclosed, the Federal Court should retain jurisdiction; its power generally to render judgment in personam against fiduciaries appointed by State Courts was expressly recognized. Here there are no extraordinary circumstances. As contemplated by Congress the Receiver sought an adjudication of his rights. The final decree produced no interference with the trustee's possession, nor with the power of the Orphans' Court to order distribution of assets. The Receiver's privilege to participate has been declared; only a judgment in personam was rendered."

Even if the control and possession of the assets of the Franklin Trust Company were in the State court no question of comity would arise as this suit is *in personam* to establish a right.

In *Riehle v. Margolies*, 279 U. S. 218, 73 L. ed. 669, 49 S. Ct. 310 (1929), it was held that the appointment of a Receiver by a Federal Court on a creditor's bill gave no right to stay a suit against the Receivership debtor then pending in the State court. The language of the Court is clear and leaves no doubt as to the petitioner's right in the instant case to have the disputed facts determined in the Federal Courts. It follows (page 224):

"The argument ignores the fact that an order which results in the distribution of assets among creditors has ordinarily a twofold aspect. In so far as it directs distribution, and fixes the time and manner of distribution, it deals directly with the property. In so far as it determines, or recognizes a prior determina-

> tion of the existence and amount of the indebtedness of the defendant to the several creditors seeking to participate, it does not deal directly with any of the property. The latter function, which is spoken of as the liquidation of a claim, is strictly a proceeding in personam. Of course, no one can obtain any part of the assets, or enforce a right to specific property in the possession of a receiver, except upon application to the court which appointed him. Lion Bonding & Surety Co. v. Karatz, 262 U. S. 77, 88-9. But the judgment of the state court does not purport to deal with the property. The sole question involved there was the existence and amount of Margolies' claim against the corporation. And the sole question involved here is the proof of that claim. There is no inherent reason why the adjudication of the liability of the debtor in personam may not be had in some court other than that which has control of the res. It is only necessary that in the receivership proof of the claim be made in an orderly way, so that it may be established who the creditors are and the amounts due them."

It is apparent from the above that the decision of the Circuit Court of Appeals for the Third Circuit in the instant case that the Federal Court should not exercise jurisdiction is in conflict with the decided cases of this Court. Moreover, it is in conflict with the decision of the Circuit Court of Appeals for the Fifth Circuit in the case of *Amos v. Trust Company of Florida, supra* (54 F. (2d) 286). Furthermore, the question presented in the foregoing petition for certiorari is one of utmost importance to the general public because of the frequent controversies upon the question of the exercise of jurisdiction of the Federal Court where a State court has concurrent jurisdiction. It is submitted, therefore, that this Court should allow the petition for certiorari.

B. The Circuit Court of Appeals for the Third Circuit Erred in Failing to Find in Favor of the Petitioner Upon the Merits.

Petitioner seeks (a) to establish the right of a preference to $8,947.50 in drafts and checks delivered to the Franklin Trust Company and *not collected* until *after* the Franklin Trust Company closed; (b) the right of ownership of $32,403.26 in cash and checks delivered by petitioner's distributors to banks in New Jersey, Delaware and Eastern Pennsylvania (hereinafter called "outlying banks") on October 2 and 3, 1931, and in their possession at the close of the business day on October 5, 1931, when the Franklin Trust Company failed—credit advices thereof were not received by the Franklin Trust Company until *after* it failed; and (c) the right of preference to $40,642.67 in cash delivered to the Franklin Trust Company by petitioner's Philadelphia distributors on October 2 and 3, 1931, for delivery in cash to petitioner's depository in New York City on October 5, 1931.

(a) Petitioner Is Entitled to the Proceeds of the Drafts and Checks in Possession of the Franklin Trust Company at the Time It Was Taken Over by Respondents, and Collected Thereafter.

The *Pennsylvania Bank Collection Act* of June 13, 1931, P. L. 568, specifically rules this case. The pertinent parts of this Act follow:

> "Except as otherwise provided by agreement . . . the bank of deposit shall be agent of the depositor for its collection and each subsequent collecting bank shall be subagent of the depositor . . ." (Section 2.)
>
> "Where a deposited item is payable to bearer or indorsed by the depositor in blank or by special in-

dorsement, the fact that such item is so payable or indorsed shall not change the relation of agent of the bank of deposit to the depositor . . . .'' (Section 4, third paragraph.)

"Where an agent collecting bank, other than the drawee or payor, shall fail or be closed for business as above, after having received in any form the proceeds of an item or items entrusted to it for collection, but without such item or items having been paid or remitted for by it either in money or by an unconditional credit given on its books or on the books of any other bank, which has been requested or accepted so as to constitute such failed collecting or other bank debtor therefore, the assets of such agent collecting bank which has failed or been closed for business as above shall be impressed with a trust in favor of the owner or owners of such item or items for the amount of such proceeds, and such owner or owners shall be entitled to a preferred claim upon such assets, irrespective of whether the fund representing such item or items can be traced and identified as part of such assets or has been intermingled with or converted into other assets of such failed bank.'' (Section 13, Clause (c).)

Under the plain language of this Act the Franklin Trust Company was an agent collecting bank, and petitioner is entitled to an immediate return of the proceeds of the checks and drafts.

The Supreme Court of Pennsylvania in *Franklin Trust Company of Philadelphia* (*Claim of C. D. Tuska*), 319 Pa. 302 (1935), has expressly so interpreted this Act.

In that case claimant on October 1, 1931, deposited a check on bank *A* with the Franklin Trust Company. Franklin Trust Company deposited the check for collection with

bank *B*. *B* sent it to bank *C*. It cleared through the New York Clearing House and was paid on October 5. Immediately the amount of the check became an unconditional credit to *B* on *C's* books. Actual payment or unconditional credit was not made by *B* to Franklin Trust Company on October 5, and at the close of that day, the Secretary of Banking took possession. The estimated date of collection was October 6, and Franklin Trust Company on two separate occasions advised claimant it would not honor his draft on it until that time. *B* paid the proceeds to the Secretary of Banking. *Held,* claimant was entitled to a preference. The Court stated at page 308:

> "Under sections 2 and 4 of that act, the trust company was clearly the agent of the depositor for its collection . . ."
>
> "No matter what the law of this Commonwealth was prior to the Bank Collection Act of 1931 or what the law may be in other jurisdictions, this act is conclusive of this controversy. The trust company was 'an agent collecting bank' within the meaning of section 13 (c) of that act. The stipulation of the parties is, *in the very words of this act,* that the item 'was neither paid nor remitted to claimant in cash or by an unconditional credit given on the books of the Franklin Trust Company or on the books of any other bank prior to the closing of the bank.' It follows that the assets of the collecting agent bank were impressed with a trust in favor of the appellee for the amount of the proceeds and that therefore the appellee is entitled to a prior claim upon such assets." (Italics by the Court.)

Under the *Pennsylvania Bank Collection Act* and the cited case decided by the highest Court of Pennsylvania, petitioner is unquestionably entitled to the sum of $8,947.50,

proceeds of checks and drafts delivered to the Franklin Trust Company for collection and uncollected until after it closed. The Circuit Court of Appeals for the Third Circuit, in contradiction to the cited act and decision, held that petitioner was not entitled to the said $8,947.50.

It is submitted that this Court should grant the petition of certiorari to review this decision in view of the fact that it is in conflict with the statute and decision of the highest Court of the Commonwealth of Pennsylvania.

(b) Upon Insolvency, the Franklin Trust Company Lost Its Right to Receive the Funds in the Outlying Banks, and Petitioner Became Entitled to Immediate Possession Thereof.

At the close of the business day on October 5, 1931, when respondents took possession of the assets and property of the Franklin Trust Company, the outlying banks had in their possession $32,403.26 in cash and drafts and checks for collection for forwarding to petitioner's depository in New York City via the Franklin Trust Company. At that time, however, the Franklin Trust Company had not received any notice nor made any record on its books that the funds had been received by the outlying banks. Notices from the outlying banks were received only after respondents had taken possession of the Trust Company. Consequently, these funds never came into the possession of the Franklin Trust Company.

Commercial Bank of Pennsylvania v. Armstrong, 148 U. S. 50, 37 L. ed. 363, 15 S. Ct. 533 (1893) rules that petitioner is the owner of said fund. In the cited case, the Commercial Bank of Pennsylvania sent paper for collection and credit to the Fidelity Bank in Cleveland, the balance to be

remitted tri-monthly. The Fidelity Bank agreed to "collect at par all points west of Pennsylvania and remit on the first, eleventh and twenty-first of each month" in consideration of the temporary use of the funds. Prior to its failure, the Fidelity Bank had sent some of the paper to subagents for collection, and they had collected it and unconditionally credited the Fidelity Bank with the amounts collected before it had become insolvent. This Court held that the funds in the sub-agent banks were the property of, and belonged to, the Commercial Bank of Pennsylvania.

This Court stated at pages 56 and 57:

> "That money never became a part of the general funds of the Fidelity; it was not applied by the subagent in reducing the indebtedness of the Fidelity to it, but it was held as a sum collected, to be paid over to the Fidelity, or to whomsoever might be entitled to it. . . . If, before the subagent parts with the money or credits it upon an indebtedness of the agent bank to it, the insolvency of the latter is disclosed, it ought not to place the funds which it has collected, and which it knows belong to a third party, in the hands of that insolvent agent or its assignee; and, on the other hand, such insolvent agent has no equity in claiming that this money, which it has not yet received, and which belongs to its principal, should be transferred to and mixed with its general funds in the hands of its assignee, for the benefit of its general creditors, and to the exclusion of the principal for whom it was collected. Whether it be said that such funds are specifically traceable in the possession of the subagent, or that the agent has never reduced those funds to possession, or put itself in a position where it could rightfully claim that it has changed the relation of agent to that of debtor, the result is the same . . . No mere bookkeeping between the Fidelity and its subagent

could change the actual status of the parties or destroy rights which arise out of the real facts of the transaction."

It is apparent that petitioner is the owner of the funds in cash, and proceeds from drafts and checks, delivered to the outlying banks and now held in escrow. Despite the decision of this Court in *Commercial Bank of Pennsylvania v. Armstrong, supra,* the Circuit Court of Appeals for the Third Circuit, failed to award the said fund to petitioner.

It is submitted, therefore, that this Court should allow the writ of certiorari in this case in view of the fact that the decision of the Circuit Court of Appeals for the Third Circuit is in conflict with the said decision of this Court.

(c) Petitioner Is Entitled to a Preference in $40,642.67 in the Franklin Trust Company.

The Franklin Trust Company expressly agreed to accept the cash sum of $40,642.67 solely for transfer and delivery in cash to petitioner's depository in New York City (R. pp. 50, 51 and 80). It had no right whatsoever to use the money itself or do anything other than deliver it to petitioner in New York. It failed to apply the cash to the purpose for which it was accepted (R. pp. 51 and 80). This money has been traced into a specific fund, namely, the cash fund of the Franklin Trust Company, which was augmented thereby, and at all times has been, and now is, in excess of the total amount of petitioner's claims (R. pp. 51, 52, 81 and 82).

That this constituted the Franklin Trust Company a trustee was forcefully enunciated by this Court in *Libby v. Hopkins,* 104 U. S. 303, 26 L. ed. 769 (1881). In that case,

Stewart and Company were bankers and merchants. Hopkins maintained a cash account and a merchandising account with them. His remittances were credited in his cash account. He paid for merchandising by draft. He borrowed $100,000.00 from Stewart and Company, giving his demand note, secured by several mortgages. He paid $25,000.00, $10,000.00, $17,000.00, $10,000.00 and $48,025.00, at various times, with instructions that same be applied upon payment of his note. The first three payments were so applied; the last two were not. Thereafter Hopkins failed, owing Stewart and Company $231,515.00, on account and unsecured. Stewart and Company endeavored to foreclose the mortgages, claiming the full principal of the note, less the first three payments. The court stated at page 308:

> ". . . And they lose sight of the controlling fact that the money and the drafts which they turned into money were remitted, with express directions to apply them on a specific debt. Without the consent of Hopkins they could never be changed into a debt due to him from the plaintiffs, and that consent has never been given.
>
> "Whether or not he had the right to direct the application, is immaterial. There was no legal obstacle to the application as directed. The fact that he gave the direction imposed on the plaintiffs the obligation to apply the money as directed, or to return it to him.
>
> "They had no better right to refuse to make the application and to retain the money and set off against it the debt due to them from Hopkins, than if they had been directed to pay the money on a debt due from him to another of his creditors, or than they had to apply to the payment of his debt to them money which he left with them as a special deposit.

"Hopkins sent them the money and drafts, upon the faith and trust that they would be applied according to his instructions. The refusal so to apply them did not change the relations of the parties to this fund, nor make that a debt which before such refusal was a trust. To so hold would be to permit a trustee to better his condition by a refusal to execute a trust which he had assumed. . . .

"But in this case there was no deposit. The relation of banker and depositor did not arise, consequently there was no debt. When A. sends money to B., with directions to apply it to a debt due from him to B., it cannot be construed as a deposit, even though B. may be a banker. The reason is plain. The consent of A. that it shall be considered a deposit, and not a payment, is necessary and is wanting. . . .

". . . The remitting of certain money assets by Hopkins to the plaintiffs, to be applied by them according to his instructions, did not make them his debtors, but his trustees."

Under the decision of this Court in the case of *Libby v. Hopkins, supra,* petitioner was entitled to the said sum of $40,642.67. The Circuit Court of Appeals for the Third Circuit in conflict with that decision held that petitioner was not entitled to this fund. It is submitted, therefore, that this Court should allow the petition for certiorari.

VI. CONCLUSION.

It has been shown that (1) the decision of the Circuit Court of Appeals for the Third Circuit that the District Court should not have exercised Federal jurisdiction is in conflict with the prior decisions of this Court and the decision of the Circuit Court of Appeals for the Fifth Cir-

cuit; also that this question of the proper exercise of Federal jurisdiction is of great public interest; (2) the decision of the Circuit Court of Appeals that petitioner was not entitled to recover on the merits was in conflict with the Statutes and decisions of the highest court of the Commonwealth of Pennsylvania and prior decisions of this Court.

It is submitted, therefore, that this Court should allow the petition and order the writ of certiorari to issue to the Circuit Court of Appeals for the Third Circuit.

Respectfully submitted,

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